IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977

No. 77-56

IN THE MATTER OF EDNA SMITH,

Appellant.

On Appeal From The
Supreme Court of The
State of South Carolina

BRIEF FOR THE APPELLANT

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OPINION BELOW

The opinion of the Supreme Court of the State of South Carolina, J.S.A. 1a-14a,[1] is reported at 268 S.C. 259, 233 S.E.2d 301 (1977).

JURISDICTION

The final order and opinion of the Supreme Court of the State of South Carolina was entered on March 17, 1977. J.S.A. 1a-14a. On June 15, 1977, by Order of the

1. "J.S.A." refers to the Jurisdictional Statement Appendix, and "App." refers to the single appendix to the briefs.

Chief Justice, the time within which to docket the appeal was extended to July 11, 1977. The jurisdictional statement was filed and the appeal docketed on July 9, 1977, and probable jurisdiction was noted on October 3, 1977. 46 LW 3179. The jurisdiction of the Court rests on 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED.

UNITED STATES CONSTITUTION, Amendment One.[1]

UNITED STATES CONSTITUTION, Amendment Fourteen, Section 1.[1]

Supreme Court of South Carolina, Rule on Disciplinary Procedure, Section 4.[2]

Disciplinary Rule 2-103(D)(5)(a) and (c) of the American Bar Association Code of Professional Responsibility adopted by the Supreme Court of South Carolina:[3]

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with

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1. The full text of the amendment is set forth at J.S.A. 18a.

2. The full text of §4 of the rule is set forth at J.S.A. 18a-19a.

3. DR 2-103(D) is set out in full at J.S.A. 19a-21a. This subsection has been substantially rewritten by the American Bar Association but the change has not been adopted in South Carolina.

the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

* * *

(5) Any other non-profit organization that recommends, furnishes, or pays for legal services to its members or beneficiaries, but only in those instances and to the extent that controlling constitutional interpretation at the time of the rendition of the services requires the allowance of such legal service activities, and only if the following conditions, unless prohibited by such interpretation, are met:

(a) The primary purposes of such organization do not include the rendition of legal services.

* * *

(c) Such organization does not derive a financial benefit from the rendition of legal services by the lawyer.

Disciplinary Rule 2-104(A)(5) of the American Bar Association Code of Professional Responsibility adopted by the Supreme Court of South Carolina:[1]

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

* * *

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

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1. DR 2-104(A) is set out in full at J.S.A. 21a-22a.

QUESTIONS PRESENTED

I. Whether the decision is in conflict with NAACP v. Button, 371 U.S. 415 (1963), and subsequent cases, which held that individual and collective activity to assure meaningful access to the courts is protected by the First Amendment unless the state demonstrates a compelling interest in support of the particular narrowly drawn regulation. Bates v. State Bar of Arizona, ___ U.S. ___, 97 S.Ct. 2691 (1977).

II. Whether appellant was denied due process of law in that she did not receive fair notice of the conduct charged, there was no evidence to support the rules found to be violated, and the disciplinary rules, as construed, are void for vagueness.

STATEMENT

This is an appeal from a public reprimand administered to appellant Edna Smith, a member of the bar, by the Supreme Court of South Carolina on March 17, 1977.[1] The state court held she had violated Disciplinary Rules 2-103(D)(5)(a) and (c) and 2-104(A)(5) of the American Bar Association Code of Professional Responsibility (hereinafter ABA Code) by soliciting a client--not for herself--but for the American Civil Liberties Union. Appellant filed a notice of appeal and probable jurisdiction was noted by this Court on October 3, 1977, 46 LW 3179. J.S.A. 1a-14a, 27a.

In order to identify the issues that are, and are not, raised by this case, it will be necessary to review the facts developed below in some detail. At the outset, however, it should be noted that the following facts are established by

1. Complaints against bar members are heard initially by a three member panel of the Board of Commissioners on Grievances and Discipline. The panel makes a report to the full board. The board files a report with the Supreme Court in all cases in which it recommends a public reprimand, suspension or disbarment; the Supreme Court may also review dismissals or private reprimands pursuant to §34 (effective June 12, 1975), of the Rule on Disciplinary Procedure for Attorneys of the Supreme Court of South Carolina. Code of Laws of South Carolina, 1976, Vol. 22, p. 78.

uncontradicted evidence in the record:

(1) Appellant Edna Smith was invited by Gary Allen, a local businessman, to attend a meeting of poor, black Medicaid mothers to discuss their constitutional rights concerning forced or unwanted sterilization as a condition for continuing to receive Medicaid assistance.

(2) At that meeting, appellant met Mrs. Marietta Williams, who had undergone a sterilization operation.

(3) Thereafter, appellant was contacted by Allen, who told her that Mrs. Williams wanted a lawyer to represent her in a suit for damages against the doctor who had sterilized her, but was unwilling to write to appellant.

(4) After conferring with the South Carolina ACLU, appellant wrote to Mrs. Williams and told her the ACLU (not appellant or her associates) "would like to file a lawsuit on your behalf for money damages against the doctor who performed the operation".

(5) Mrs. Williams eventually decided not to sue. Accordingly, no lawsuit resulted from the letter in question, and appellant had no further contact with Mrs. Williams.

(6) There is no claim that appellant would have benefitted financially, or in any other way, from any suit by Mrs. Williams against her doctor.

Sterilization of Welfare Mothers

During the summer of 1973, local and national newspapers reported that certain pregnant mothers on welfare in Aiken County, South Carolina, most of whom were black, were being sterilized or threatened with sterilization as a condition for continuing to receive Medicaid assistance.[1] See, "3 Carolina Doctors Are Under Inquiry in Sterilization of Welfare Mothers," New York Times, July 22, 1973, p. 30.

1. "Medicaid" is the designation of a federal-state program that provides payment for medical and hospital services rendered to persons who qualify as indigent. In South Carolina, eligibility is limited to those persons who are receiving welfare payments for subsistence.

Living in Aiken at that time was a local businessman named Gary Allen, who for several years had been active in community activities in Aiken County and South Carolina. App. 189-92. He was then president of the United Christian Workers, whose purposes included helping poor people receive public assistance and protecting welfare recipients against various forms of discrimination. App. 192.[1] Allen had known for many years some of the Medicaid patients who had been sterilized, and their families. App. 193. Because of that friendship and his concern with discrimination in the welfare system, he discussed with them on several occasions the lawfulness of sterilization as a condition for continuing to receive Medicaid benefits and whether the practice could be stopped. App. 193-94, 200-02.

1. Allen, who had a prior criminal record, was also a member of the South Carolina Association for Improved Justice which helped indigent persons accused of crimes in receiving adequate assistance of counsel and other constitutional guarantees. App. 190-91, 197.

Following their discussions, Allen and the women decided to seek legal advice and assistance. App. 195-96, 201-02. Allen did not, however, believe that they could get help in Aiken. "[P]oor people ... just doesn't have the representation there in Aiken very much." App. 191.[1] Accordingly, he contacted Ed McSweeny, an employee of the South Carolina Council on Human Rights, a private, non-profit organization with offices in Columbia. App. 89-90, 194-95. One of the Council's projects was a continuing study of public assistance in South Carolina. App. 91. Allen asked that the Council send someone to Aiken to talk with the women involved in the sterilizations. App. 194-95. Appellant was at that time on retainer to the Council as a consultant and McSweeny asked her to respond to Allen's request for help. App. 89-90.

1. The three member panel which originally heard the complaint on March 20, 1975, sustained an objection to appellant's questions to Allen concerning the availability of legal assistance to indigents and minorities in Aiken as going into "an area that really isn't involved in this particular proceeding." App. 191-92. Counsel then made an offer of proof "that this witness would testify that it's difficult for minority people in Aiken County to secure representation particularly in unpopular causes where they have been aggrieved by members of the majority community." App. 192.

Edna Smith

Edna Smith, a black woman, was admitted to the South Carolina Bar in September, 1972. Her father was a sharecropper in Yemassee, South Carolina, and her mother did domestic and custodial work. Using her own earnings and several scholarships, she completed an undergraduate degree from the University of South Carolina in 1966, and a law degree there in 1972. App. 83-5.

Throughout her adult life she has been active in social service and civic projects, both as a volunteer and as a paid employee. She has done voter education work, been a counselor in an Upward Bound program, is a charter member of the Greater Columbia Literacy Council (1969), helped establish a local day-care center, and since 1972 served as a cooperating attorney and member of the board of directors of the South Carolina ACLU.[1] She has taught courses in law at Columbia College, Allen University, and the extension division of the University of South Carolina, all in the City of Columbia. App. 86-8.

1. Board members and cooperating attorneys serve without compensation. Appellant has never even been reimbursed for out-of-pocket expenses incurred on behalf of the ACLU. App. 89.

After admission to the bar, she set up private practice with two others under the name Carolina Community Law Firm. Each member paid a pro-rata share of office expenses but each retained his or her own fees. The office later adopted stationery with the letterhead "Buhl, Smith and Bagby" but the practice of sharing expenses and retaining individual fees continued. One of the attorneys in the office, Herbert Buhl, was a part-time staff attorney for the South Carolina ACLU. App. 133-34, 144-47.

One of appellant's first clients was the South Carolina Council on Human Rights. Sometime during July, 1973, she was instructed by Ed McSweeny of the Council to contact Allen and arrange to meet with him and the Medicaid mothers involved in the sterilizations. She did as directed and Allen arranged a meeting for later in the month. App. 89-91, 107-08, 124-25. At that time, appellant did not know and had never met Allen or any of the Medicaid mothers. App. 90, 113, 116, 141.

The Aiken Meeting

After talking with appellant, Allen notified the Medicaid mothers with whom he had been in contact of the meeting to be held in his office. A. 194-198. One of the women he notified was Marietta Williams, who had been sterilized by her doctor after the birth of her third child. App. 30, 40-1. Allen was an old friend, both of Mrs. Williams and her family. As Mrs. Williams acknowledged, "I had been knowing Mr. Allen -- see, my grandmother knowed all about him from childhood and I always have known him because he has been a friend of my family for years." App. 65.[1] Mrs. Williams came voluntarily to the meeting

1. According to Allen, Mrs. Williams "had been raising sand ... because she felt she had been mistreated by the doctor." App. 193. He testified that Mrs. Williams had specifically asked that "counsel ... come down and discuss this matter with her and ... see what could be done." App. 195. In spite of their admitted long-standing friendship, Mrs. Williams, the state's only witness, denied at the hearing that she had ever discussed her sterilization with Allen prior to being told of the July meeting and even denied that she had ever had "any discussion of any kind with Mr. Allen." App. 58, 65, 74. Mrs. Williams frequently contradicted herself throughout her testimony. App. 32, 42, 49-52, 62, 71. She enjoys the reputation in her community of being "today

(Footnote continued to next page.)

with her grandmother because she wanted "to see what it was all about." App. 41-2.[1]

At the meeting, appellant Smith met Mrs. Williams for the first time. App. 116. After Allen introduced her, she informed them that she was an attorney and then "talked to the ladies to find out ... what had happened ... and [answered] general questions about the sterilization itself." App. 91. She told the "group in general, and I might have told Mrs. Williams the same thing, that they had certain rights under the constitution." App. 109. She also discussed with Allen, in the presence of the group, the recourse the women might have if they felt they had been coerced into accepting sterilization. Ibid. But she did not tell any of the women directly that they could or should bring a lawsuit for money damages or any other kind of relief, nor did she offer to represent Mrs.

(Footnote continued from preceding page.) ... one way and tomorrow ... another way." App. 204. The lower court made no finding concerning the extent of contact between Allen and Mrs. Williams prior to his notifying her of the July meeting.

1. According to Mrs. Williams, Allen had told her they would discuss the possibility of suing the doctor who had performed her sterilization. App. 41.

Williams or anyone else present. App. 101, 110. As Allen put it, the purpose of the meeting was not to discuss litigation, but "just to kinda advise the girls of their rights and sit down and discuss the matter." App. 201.[1]

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1. Mrs. Williams' testimony was contradictory as to whether appellant offered to represent her, but she was emphatic that appellant never offered to represent her for a fee. App. 62-4. On four occasions, generally in response to leading questions, Mrs. Williams testified that appellant offered personally to represent her, but on five other occasions she denied -- or failed to assert -- that appellant offered to represent her. App. 32, 42, 49-52, 62, 71.

Both appellant and Allen denied that any offer of representation was made at the July meeting and the State did not offer the testimony of any other person to confirm Mrs. Williams' testimony, although others had been present at the meeting. In any case, the panel, which observed Mrs. Williams' demeanor, did not find that appellant had offered to represent Mrs. Williams, and the lower court concurred in that assessment. J.S.A. 6a, 16a.

The Sterilization Law Suit

After the July meeting, Allen contacted appellant, by letter and telephone, and told her several of the women had decided to file a law suit against the doctor who had sterilized them, or threatened them with sterilization, and wished legal assistance. App. 94, 96-7. Appellant advised him to have the women request help from the ACLU. App. 97. Two of them did and the ACLU agreed to secure representation for them. A law suit was eventually filed against their doctor, Clovis Pierce, and several state officials, by lawyers associated with the ACLU. See, Doe v. Pierce, Civ. No. 74-475, D.S.C. (Exhibit C-2, App. 76).[1] Appellant and her associate Buhl, the part-time staff attorney for the ACLU, did not represent the plaintiffs in that litigation.[2] App. 107, 114.

1. One of the plaintiffs in Doe v. Pierce, supra, recovered a judgment against the doctor following a jury trial, but the court of appeals reversed on the ground that the requisite state action to maintain the suit was lacking. Walker v. Pierce, 560 F.2d 609 (4th Cir. 1977).

2. Carlton Bagby, the third attorney in her office, was one of several attorneys for plaintiffs in Doe. The state court erroneously found that Buhl was counsel in Doe. J.S.A. 3a.

Sometime during August, 1973, Allen contacted appellant again and told her that Mrs. Williams also wished to bring suit. Would appellant, he asked, write to her and let her know if the ACLU would get a lawyer to represent her in a damage action against her doctor? App. 94, 96-7, 99, 123, 196. Appellant was not surprised that Mrs. Williams had not written to her, for she had observed that Mrs. Williams had very little education. App. 99.

Appellant was informed that the board of directors of the state ACLU had agreed to furnish representation to the Aiken Medicaid mothers and accordingly wrote to Mrs. Williams on August 30, 1973, offering to her the assistance of the ACLU. App. 132-33, 135-37. It was that letter which the lower court found constituted unethical solicitation in violation of the ABA Code.[1] The evidence is not contradicted that Allen told appellant Mrs. Williams wished to bring suit and that appellant acted at his request in writing the letter, and with the knowledge of the apparent relationship between Allen and Mrs. Williams

1. Mrs. Williams conceded that she had at one time expressed a desire to sue her doctor, but denied that she had told this to Allen. App. 43-4, 57-8. According to appellant, she had said at the July meeting that her sterilization had been "forced." App. 105-6, 126.

and Mrs. Williams' statements that her sterilization had been involuntary. App. 115-16. The letter provides, in relevant part:

> You will probably remember me from talking with you at Mr. Allen's office in July about the sterilization performed on you. The American Civil Liberties Union would like to file a law-suit on your behalf for money against the doctor who performed the operation. We will be coming to Aiken in the near future and would like to explain what is involved so you can understand what is going on.
> J.S.A. 25a-26a.

Shortly after she received the August 30, 1973, letter, Mrs. Williams visited her doctor, later a defendant in Doe v. Pierce, supra. The purpose of the visit was to discuss the progress of her child, who was suffering from dehydration, and for post-partum examination. App. 30, 44, 60, 67. At the doctor's office she was met by the doctor and his attorney, B. Henderson Johnson. App. 44-5, 58, 70. Mrs. Williams had never been represented by Johnson or by any other attorney at that time. App. 58, 67-9. Johnson stated that he knew she had prior contact with appellant and wanted to know

whether she intended to sue Dr. Pierce. She answered that she did not and was asked to sign a release of liability in favor of the doctor. She signed the release and showed the August 30, 1973, letter to the doctor and lawyer. App. 49-52, 70, 100-01, 242-43. They retained a copy and allowed her to use the telephone to notify appellant of her intentions not to sue.[1] App. 51-2, 59-60, 69.

According to appellant, Mrs. Williams called her twice after receiving the August letter. During the first conversation she said that she had signed a release with Dr. Pierce and would not bring any action against him. "This was at the request of either her mother or her grandmother and Dr. Pierce." App. 100. Later that afternoon, Mrs. Williams called again "saying that she was thinking about the matter and was just wondering ... if maybe she could change her mind. She told me then that she ... could ... [not] go against ... her mother or grandmother." App. 100-01. That was the last contact appellant had with Mrs. Williams. App. 69.

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1. Mrs. Williams, in her affidavit, stated that she had been "directed" to call appellant from the doctor's office. App. 242-43.

The Charge of Solicitation

The letter from appellant to Mrs. Williams, which forms the basis for the complaint in this case, was not referred to the Board of Commissioners on Grievances and Discipline until August 19, 1974, nearly one year after it came into the possession of Dr. Pierce's lawyer.[1] The letter, in fact, was referred to the board only after the complaint in Doe v. Pierce, supra, was filed and only after defense attorneys had used it in an unsuccessful attempt to get the complaint dismissed on the grounds that the case was barred or rendered unlawful because of solicitation.[2] When one of the plaintiffs in Doe v. Pierce, supra, was deposed concerning solicitation, United State District Judge Sol Blatt, Jr. ruled

1. The letter was sent to the board by A. Camden Lewis, an Assistant Attorney General of South Carolina, who represented certain defendants in Doe v. Pierce, supra, and who has been an attorney of record in this case. App. 24. The letter was in the Attorney General's possession prior to April 29, 1974, at which time it was produced at a deposition of Eldon Wedlock, Associate Professor at the University of South Carolina Law School and then President of the South Carolina ACLU. (Exhibit R-2, p. 16, et seq., App. 206.)

2. See transcript excerpt of May 10, 1974, hearing in that case. App. 252-57.

that "the Court finds no fault with the situation out of which this suit arose with the attorneys connected with the ACL[U], in contacting if that in fact did happen, the plaintiffs ..." App. 248. (Exhibit R-3, App. 206.) The favorable ruling of Judge Blatt was never forwarded to the board or brought to its attention by any of the defense lawyers in Doe v. Pierce, supra, or attorneys in the State Attorney General's office.

The secretary of the board filed the complaint against appellant on October 9, 1974, charging that she had committed "solicitation in violation of the Canons of Ethics" by writing the August letter to Mrs. Williams. J.S.A. 23a-36a. In 1973, the Supreme Court of South Carolina had repealed the Canons of Professional Ethics referred to in the complaint and had adopted, instead, the ABA Code. The complaint, however, did not mention the ABA Code, and did not specify which disciplinary rule or rules were allegedly violated.

In her Answer filed on October 31, 1974, and Amended and Supplemental Answer filed on March 12, 1975, appellant denied that she had committed "solicitation" and asserted inter alia that her conduct was

protected by the First and Fourteenth Amendments of the Constitution and by Canon 2 of the ABA Code, that the Rule on Disciplinary Procedure of the Supreme Court of South Carolina pursuant to which the complaint was filed was vague and overbroad, and that the complaint was in retaliation against her because of her race, sex, and associational activities with the ACLU. App. 5-20.[1]

The Hearing

The complaint was heard by the panel of the board on March 20, 1975. The state's evidence consisted solely of the letter, the testimony of Mrs. Williams and copies of the summons and complaint in Doe v. Pierce, supra. At the close of the state's case, appellant moved to dismiss on the grounds that the

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1. Appellant attempted to enjoin the disciplinary proceedings by filing an action in the federal district court. The complaint was dismissed on grounds of Younger v. Harris, 401 U.S. 37 (1971), without reaching the merits and the dismissal was affirmed on appeal. American Civil Liberties Union v. Bozardt, 539 F.2d 340 (4th Cir. 1976). Three judges dissented from denial of a petition for rehearing en banc in an unreported opinion set out at J.S.A. 28a-34a. Review was denied by this Court, ___ U.S. ___, 97 S.Ct. 639 (1976).

complaint failed to allege a violation of any disciplinary rule and that there was no evidence of "solicitation." App. 77-80. The motion was denied. App. 82.

Appellant offered to show through expert testimony the difficulty of obtaining representation in unpopular cases and the effect of disciplinary proceedings upon attorneys who have tried to assist in providing representation for unpopular clients. App. 164. Appellant also offered to show that such disciplinary proceedings, regardless of their merit, diminish the availability of legal service and information to the general public, particularly to the underprivileged. App. 165-66.

Appellant next offered to show that, unless members of the bar take the initiative and make available to aggrieved persons information about their legal rights and about the availability of legal counsel from organizations such as the ACLU, constitutional and other legal rights will not be vindicated. App. 167. The panel ruled that such evidence was "beyond the scope of this particular inquiry." App. 168.

The panel also refused to permit opinion evidence from Professor Daniel H. Pollitt of the University of North Carolina School of Law, who was qualified as an expert in constitutional law, whether appellant's conduct was constitutionally protected or whether she had committed solicitation. App. 168-69.

Through testimony of another witness, Charles Lambeth, a former member of the National Board of Directors of the ACLU, appellant sought to establish that the ACLU was in the nature of a legal aid or public defender office, that it was a legitimate non-profit organization, and that one of its purposes was to educate laypeople about their rights and remedies and to make counsel available to them. App. 183-84. The panel first ruled that the purposes and method of operation of the ACLU were irrelevant. "The Panel really doesn't see that the purpose of that organization is an issue in this lawsuit at all, we are not trying this organization." App. 184. Then the following exchange occurred:

> MR. McDONALD: ... this witness would testify that the ACLU is in the nature of a legal aid or public defender office, and that it is operated and sponsored by a legitimate non-profit organization. And that one of its purposes is to educate layman [sic] as to their rights and their remedies and to make counsel available to them.
>
> [PANEL CHAIRMAN]: Is there any question in your mind that that's the purpose? I don't know what relevance it has. Isn't this a matter that there isn't any dispute about?
>
> MR. KALE: I don't have any dispute about it.

App. 185.

Then, the panel ruled that "we could shorten this ... by simply stipulating ... that this is what the American Civil Liberties Union is, this is its purpose and this is what it does." App. 185-6.[1]

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1. The ACLU is a national organization of more than a quarter million members located in 49 state-wide affiliates and 379 local chapters. Since its inception in 1920 its sole purpose has been defense of the Constitution and its Bill of Rights. The ACLU's program consists of legislative reform, education and litigation in the public interest. The goal of ACLU litigation, in general terms, is to advance understanding and acceptance of civil liberties principles. Policy #513, 1976 Policy Guide of the
(Footnote continued to next page.)

Appellant then offered to show by testimony of the same witness that because of the activity of the ACLU, individuals have, with greater frequency, been able to seek redress of constitutional violations. Again, the panel ruled the evidence was not "germane." App. 186. The panel also found irrelevant appellant's proffered evidence that the ACLU considered its activities constitutionally protected. App. 187-88.

The panel filed a report recommending that appellant be found guilty of soliciting a client on behalf of the ACLU, not on behalf of herself. The panel recommended a private reprimand as discipline, noting that it was "impressed by the fact that the respondent's activities were neither

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(Footnote continued from preceding page.)

American Civil Liberties Union. Clients are never charged any fee.

aggravated nor widespread .... The violation ... is isolated to one particular class action." J.S.A. 17a.[1] After a hearing on January 9, 1976, the board approved the panel report and administered a private reprimand. J.S.A. 1a.

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1. At the hearing before the panel, several members of the Columbia bar, all of whom had known appellant for several years prior to 1973, testified that her reputation as a member of the bar, her reputation for truth and veracity, and her reputation for ethical practices at the bar were "outstanding," "excellent," "very good." App. 150, 153-55. One of them testified that appellant "adheres to the highest ethical practices the profession could expect." He also offered to testify that he personally knew of litigation in which he had been retained as counsel that appellant had had an opportunity to steer to herself for compensation but, instead, had chosen to assist him in the litigation without compensation. App. 150-51.

The Court Below

Appellant petitioned the Supreme Court of South Carolina to review and expunge the private reprimand. Review was granted. There was no cross-petition seeking an increased penalty, yet on March 17, 1977, the state court entered its order adopting the panel report and, sua sponte, increasing the discipline administered from a private reprimand to a public reprimand. J.S.A. 1a-14a.

The basis for the public reprimand was stated as follows:

> The evidence is inconclusive as to whether the respondent solicited Mrs. Williams on her own behalf, but she did solicit Mrs. Williams on behalf of the ACLU, which would benefit financially in the event of successful prosecution of the suit for money damages.[1]
> J.S.A. 6a.

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1. There was no evidence to support any implication that the ACLU would have received part of a damage award recovery by Mrs. Williams. The ACLU and its state affiliates never take or accept even one penny of any damage award to a plaintiff they have represented. One of the plaintiffs in Doe v. Pierce, supra, did recover judgment in the amount of $5, but the award was vacated by the court of appeals.
(Footnote continued to next page.)

Appellant was held to have violated two disciplinary rules:

(1) DR 2-103(D)(5)(a) and (c), which, by its terms, solely prohibits an attorney from "knowingly assist[ing] a person or organization ... to promote the use of his services or those of his partners or associates." There was no finding that appellant or the ACLU ever promoted the use of her own professional services, or those of her associates.

(2) DR 2-104(A)(5), which, by its terms, states that an attorney who has given unsolicited advice "shall not accept employment resulting from that advice." There was never even any claim that appellant or anyone else accepted employment by Mrs. Williams.

(Footnote continued from preceding page.)
Walker v. Pierce, supra. The only way the ACLU could possibly benefit financially would be by recovery of a court award of costs or attorney's fees. Because of the panel's declared disinterest in the ACLU, no detailed evidence concerning attorney's fees awards was offered. The only evidence in the record concerning attorney's fees is that such awards, if any had been received, constituted an insignificant portion of the budget of the North Carolina affiliate. App. 182-83.

SUMMARY OF ARGUMENT

I

Appellant offered free legal assistance of the American Civil Liberties Union to an indigent woman of limited education whom appellant had previously met and understood had been forced to submit to sterilization as a condition for receiving Medicaid benefits. The offer was made without any hope or possibility of personal financial gain. The offer was made many weeks after the sterilization had occurred and was in the form of a letter written at the specific request of one of the woman's friends and a community organization appellant knew to be acting on her behalf. Appellant's conduct, under the circumstances, was speech and associational activity protected by the First Amendment. NAACP v. Button, 371 U.S. 415 (1963); Bates v. State Bar of Arizona, ___ U.S. ___, 97 S.Ct. 2691 (1977).

The state did not identify or advance, nor did the lower court find, any state interest to justify punishment of appellant for her First Amendment activity. That fact alone requires reversal. Sherbert v. Verner, 374 U.S. 398, 407 (1963). To the

extent that there are any conceivable state interests justifying regulation of offers of legal assistance, such interests may be achieved by more narrowly drawn regulations than those adopted by the state court. Wooley v. Maynard, ___ U.S. ___, 97 S.Ct. 1428, 1436 (1977); NAACP, supra, 371 U.S. at 433.

Two conceivable state interests involved -- the "dignity of the profession" and strains on disciplinary enforcement -- have already been definitively rejected by this Court in Bates, supra, 97 S.Ct. at 2704, n. 30 and 2706-07. Other conceivable interests -- prohibiting overreaching and misrepresentation -- are not relevant to the facts of this case and can be achieved by more narrow regulation. Bates, supra, 97 S.Ct. at 2704, n. 31 and 2708. The contact in this case, a letter written at the request of a disinterested third party, was wholly unobtrusive and did not occur in any situation that "breeds undue influence." Bates, supra, 97 S.Ct. at 2700. A prohibition of fraud and deception is the constitutionally appropriate remedy, not a total ban on offers of service. Bates,

supra, 97 S.Ct. at 2704, n. 31 and 2708.

The concern for "stirring up" litigation does not apply in this case since there is no evidence that appellant acted maliciously. NAACP v. Button, supra, 371 U.S. at 439-40. The state had more narrow regulations to proscribe malicious and oppressive litigation, regulations that were never invoked in this case. DR 7-102(A)(1) and (2); DR 7-105(A). Bates, supra, 97 S.Ct. at 2705.

Offering free legal assistance to those in need is consistent with the highest traditions of the bar and Canon 2 of the American Bar Association Code of Professional Responsibility. The vindication of constitutional rights through litigation has always been regarded as a different matter from the oppressive or avaricious use of legal process for private gain. NAACP v. Button, supra, 371 U.S. at 443.

II

Bar disciplinary proceedings, being "quasi-criminal" in nature, require that the person charged with misconduct be given fair notice of the precise charges, In re Ruffalo, 390 U.S. 544, 550-51 (1968), and the specific issues to be met. In re Gault, 387 U.S. 1, 34 and n. 54 (1967). The complaint in this matter, however, alleged only "solicitation in violation of the Canons of Ethics." App. 2. Appellant was given no notice of the disciplinary rule(s) allegedly violated nor the elements of the offense(s) charged. Only after the panel issued its report did she learn how her conduct was thought to violate the law. This procedure denied her fair notice and due process.

Further, there was no proof nor finding of numerous elements of the disciplinary rules. The absence of proof of essential elements of the offenses also violated due process. Thompson v. City of Louisville, 362 U.S. 199 (1960).

The state court read the disciplinary rules expansively, rather than narrowly. The court did not ask whether the rules prohibited appellant's conduct, but rather whether the rules expressly permitted it; finding no express authorization, the rules were held to proscribe the writing of the letter. The resulting construction retroactively proscribed appellant's conduct, and made the rules, as applied to her, fatally vague. Bouie v. City of Columbia, 378 U.S. 347, 352 (1964).

ARGUMENT

I. INDIVIDUAL AND COLLECTIVE ACTIVITY TO ASSURE MEANINGFUL ACCESS TO THE COURTS FOR VINDICATION OF CONSTITUTIONAL RIGHTS IS PROTECTED BY THE FIRST AMENDMENT. ACCORDINGLY, APPELLANT'S LETTER, AND HER COMMUNICATIONS AND ACTIVITIES PRECEEDING THE LETTER, WERE CONSTITUTIONALLY PROTECTED.

Prior decisions of the Court show that appellant's communication and activities were presumptively protected by the First Amendment, and thus not subject to state regulation or sanction, absent a compelling state interest.[1]

In NAACP v. Button, 371 U.S. 415, 421, 429 (1963), the Court held that individual attorneys could attend meetings of prospective clients, urge and persuade persons in attendance to bring lawsuits, and then represent them (which was not done or offered in this case), and that those activities were protected as "a form of political expression."

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1. Appellant will show infra, Point II, that the state did not advance or prove any compelling state interest, and that the court below did not identify any compelling state interest that justified disciplinary sanctions in the circumstances of this case.

The Court rejected the state's argument that "solicitation" was "wholly outside the area of freedoms protected by the First Amendment." 371 U.S. at 429.

> [A]bstract discussion is not the only species of communication which the Constitution protects; the First Amendment also protects vigorous advocacy, certainly of lawful ends, against governmental intrusion. [Citations of authority omitted.] In the context of the NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.[1] Id.

In three cases since Button, the Court has expanded the scope of that decision and has made clear that individual and collective activity to assure meaningful access to the courts is a constitutionally protected

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1. The Court then cited with approval an ACLU Report and a Comment, "Private Attorneys-General: Group Action in the Fight for Civil Liberties," 58 Yale L.J. 574 (1949), which discussed the similar litigation activities of the ACLU. 371 U.S. at 429, n. 12, and 440, n. 19.

right, no matter what legal issue is sought to be litigated. Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1 (1964)(FELA claims); United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967)(workmen's compensation claims prosecuted by a retained staff attorney); United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971)(FELA claims). In the last cited case, the Court criticized the state court for "[giving] our holding in Trainmen the narrowest possible reading", 401 U.S. at 579-80. And last term, the Court reaffirmed this principle in Bates v. State Bar of Arizona, ___ U.S. ___, 97 S.Ct. 2691, 2705, n. 32 (1977):

> The Court often has recognized that collective activity undertaken to obtain meaningful access to the courts is protected under the First Amendment. [Citations of authority omitted.] It would be difficult to understand these cases if a lawsuit were somehow viewed as an evil in itself. Underlying them was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them.[1]

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1. The record in this case contains an uncontradicted offer of proof that access to the courts for the protection of civil

(Footnote continued to next page.)

Accordingly, the "collective activity" undertaken by Gary Allen, the South Carolina Council on Human Rights, and appellant, all of which was designed to provide poor, black

(Footnote continued from preceding page.)
liberties can be meaningfully assured, in many instances, only by affirmative offers of legal assistance to aggrieved parties. App. 167. Cf. The opinion of the Supreme Court of Appeals of Virginia reviewed in Button, sub nom. NAACP v. Harrison, 202 Va. 142, 116 S.E.2d 55, 63 (1960):

> Only one witness, out of some twenty-four litigants in school cases, testified that he would have instituted legal proceedings if the NAACP had not agreed to finance them.

As Ethical Consideration 2-1 of Canon 2 of the ABA Code (which also contains the disciplinary rules which appellant allegedly violated) expressly notes, "important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available." "The legal profession should assist laymen to recognize legal problems because such problems may not be self-revealing and often are not timely noticed." EC 2-2.

women who had been "aggrieved" by unwanted sterilization with "information regarding their legal rights and the means of effectuating them," was precisely the type of activities held to be constitutionally protected in Bates, Button and other decisions of this Court.

Furthermore, although the collective activities involved in this case are similar to the collective activity involved in Button, and are therefore "a form of political expression,"[1] it is now clear from this Court's more recent decisions that speech is protected, even though it advises potential clients through advertising of the availability and cost of legal services to be provided by the advertiser. Bates v. State Bar of Arizona, supra. The speech in this case was to facilitate informed decisionmaking by women whether they would be sterilized, and to promote

1. The court below sought quite incorrectly to distinguish Button on the basis that the NAACP was considered a political organization, J.S.A. 13a.

equal treatment of welfare recipients. Unquestionably, such speech advanced "individual and societal interests" and is protected. Bates, supra, 97 S.Ct. at 2699.

The First Amendment does not permit the state to prohibit speech simply because of its content, if that content does not constitute a crime, e.g., extortion or obscenity. Cf. Tinker v. Des Moines Community School District, 393 U.S. 503, 510-11 (1969). Appellant's offer of the assistance of the ACLU was pure speech. As in Bridges v. California, 314 U.S. 252, 275-8 (1941), this case involves "a pure form of expression" indistinguishable from the telegram in Bridges. Cox v. Louisiana, 379 U.S. 559, 564 (1965). When speech is accompanied by conduct, the conduct may be regulated, just as those who use the public ways for pure speech are subject to regulation of the place, time, and manner of their speech activities. See, Cox v. Louisiana, 379 U.S. 536, 558 (1965); Adderly v. Florida, 385 U.S. 39, 47-8, and ns. 6 and 7 (1966). Cf. Bates v. State Bar of Arizona, supra, 97 S.Ct. at 2718, n. 12 (Powell, J., dissenting). But there can be no justification for an absolute ban on offers of free legal assistance.

II. THE ABRIDGMENT OF APPELLANT'S FIRST AMENDMENT RIGHTS, IN THE CIRCUMSTANCES OF THIS CASE, WAS NOT JUSTIFIED BY A COMPELLING STATE INTEREST AND IS OVERBROAD.

In order to regulate or punish communications and activities protected by the First Amendment, the state must meet the affirmative burden of proving that the regulation is "necessary" to achieve a "compelling" and "legitimate" state interest; and the state's asserted justification must be subjected to "strict" and "close" judicial scrutiny. NAACP v. Button, 371 U.S. 415, 433, 438-39 (1963); NAACP v. Alabama, 357 U.S. 449 (1958); Buckley v. Valeo, 424 U.S. 1, 25 (1976). See also, Bates v. Little Rock, 361 U.S. 516, 524 (1960); Abood v. Detroit Board of Education, ___ U.S. ___, 97 S.Ct. 1782, 1812 (1977); Elrod v. Burns, 427 U.S. 347 (1976); Cousins v. Wigoda, 419 U.S. 477, 489 (1975); Healy v. James, 408 U.S. 169 (1972); Baird v. State Bar of Arizona, 401 U.S. 1 (1971); In re Stolar, 401 U.S. 23 (1971); Williams v. Rhodes, 393 U.S. 23 (1968); Schneider v. Smith, 390 U.S. 17 (1968); Shelton v. Tucker, 364 U.S. 479, 488 (1960).

Even if appellant's conduct could constitutionally be punished under a properly drawn rule, the disciplinary rules as construed are overbroad, because they "sweep within [their] ambit protected speech or expression." Doran v. Salem Inn, Inc., 442 U.S. 922, 933 (1975); Wooley v. Maynard, ___ U.S. ___, 95 S.Ct. 1428, 1436 (1977); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213-14 (1975); Grayned v. City of Rockford, 408 U.S. 104, 114 (1972); Gooding v. Wilson, 405 U.S. 518, 522 (1972). Free speech is fundamental in a free society. As this Court noted in Bates, supra, 97 S.Ct. at 2707:

> [A]n overbroad statute might serve to chill protected speech. First Amendment interests are fragile interests, and a person who contemplates protected activity might be discouraged by the in terrorem effect of the statute. See NAACP v. Button, 371 U.S. 415, 433 (1963). Indeed, such a person might choose not to speak because of uncertainty whether his claim of privilege would prevail if challenged.

Appellant's First Amendment rights were also violated because of the vagueness of the rules applied, Grayned v. City of Rockford, supra, 408 U.S. at 114, since the uncertain meanings will lead citizens to "steer far wider of the unlawful zone" than a constitutionally valid rule could require. Speiser v. Randall, 357 U.S. 513, 526 (1958). The particular aspects of vagueness are disucssed, infra, Point III.

A. The Record In This Case Shows That The State Did Not Advance, And The Court Below Did Not Find, A Compelling State Interest.

The state did not even attempt to advance a "compelling" interest that made "necessary" the regulation and punishment of appellant's First Amendment activity, and the court below did not find any such interest. Indeed, the court below did not even attempt to identify conceivable state interests the state might have advanced. Thus, the state utterly failed to meet its burden to demonstrate a necessary and compelling state interest, and the court below erred in failing to subject the state's regulation of appellant's First Amendment activity to close and strict judicial scrutiny. Such failures alone require reversal. Sherbert v. Verner, 374 U.S. 398, 407 (1963):

> [W]e are unwilling to assess the importance of an asserted state interest without the views of the state court.

B. In The Circumstances of This Case, The Conceivable State Interests Which Are Advanced By The State Would Not Justify Regulation and Punishment of Appellant's Communications and Activities.

The state's conceivable interests are identified, for the first time, in the Motion to Dismiss or Affirm, pp. 9-10, where the state describes the following "dangers" of allowing attorneys to "attempt to induce or pressure" potential litigants to bring suit:

> The dangers in allowing such conduct ... include over-reaching, misrepresentation, stirring-up litigation, preserving the dignity of the profession, and adversely effecting [sic] disciplinary enforcement (footnotes omitted).

These "dangers" have no application here, since Mrs. Williams, the prospective litigant, specifically testified that "Edna Smith did not attempt to persuade or pressure me to file this lawsuit." App. 52. Nevertheless, because they are the only conceivable justifications offered by the state, they will be discussed. In general, the state's conceivable justifications

mirror quite closely the justifications rejected by the Court in Bates v. State Bar of Arizona, ___ U.S. ___, 97 S.Ct. 2691, 2701-07 (1977). Furthermore, to the extent any of these justifications may be legitimate, they may be achieved by more narrowly drawn regulations that do not abridge First Amendment rights. See Wooley v. Maynard, ___ U.S. ___, 97 S.Ct. 1428, 1436 (1977) ("'The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same purpose.'"), United Transportation Union v. Michigan, 401 U.S. 576, 581 (1971); NAACP v. Button, supra, 371 U.S. at 433.

1. "Overreaching."

The state defines "overreaching" as "approaching clients at times when the clients are in no condition to properly consider retention of a lawyer." Motion to Dismiss or Affirm, p. 9, n. 14. The first time appellant spoke to Mrs. Williams was at a meeting Mrs. Williams voluntarily attended, knowing its purpose, "[t]o see what it was all about." App. 41. Thereafter, appellant wrote a letter to Mrs. Williams. It is difficult to conceive of

two less intrusive contacts: neither occurred "at the hospital room or the accident site, or in any other situation that breeds undue influence." Bates v. State Bar of Arizona, supra, 97 S.Ct. at 2700.[1]

The proper remedy for "overreaching" would be to regulate the place, time and/or manner of contacts, not to ban, absolutely, all offers of assistance.

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1. Although appellant did not meet Mrs. Williams "at the hospital room," another lawyer did. B. Henderson Johnson, a local Aiken lawyer, met Mrs. Williams at her doctor's office, and at a time when she was distracted by the serious illness of her child. Even though Mrs. Williams was unrepresented and Johnson knew she had an adverse interest and a potential claim against his client, the doctor, he secured from her a formal release of liability in favor of his client. App. 50, 100-01, 243. Apparently the state does not consider that contact to be "overreaching," because no disciplinary proceeding, to appellant's knowledge, has been brought against that lawyer. See, DR 7-104(A)(2).

2. "Misrepresentation."

In a proper case, preventing misrepresentation would be a legitimate state interest, perhaps even a compelling one. Bates, supra, 97 S.Ct. at 2706. But there is no evidence or allegation that appellant misrepresented anything to anyone. Furthermore, the prohibition of fraud and deception by narrowly drawn rules is the constitutionally appropriate remedy, not a total ban on offers of services. Bates, supra, 97 S.Ct. at 2704, n. 31, 2708.

3. "Preserving Dignity of the Legal Profession."

The state argues that offers of legal assistance undermine the dignity of the profession by reducing the bar's reliance on good reputation. Motion to Dismiss or Affirm, p. 9, n. 16. As the Court noted in Bates, supra, 97 S.Ct. at 2704, n. 30, this is an extremely speculative argument. The Court in Bates thought this argument was not sufficiently compelling to justify regulation of advertising; nor would it justify regulation of appellant's communication.

4. "Adverse Effects on Disciplinary Enforcement."

The state's argument on this point is unclear. The state's argument in Bates, rejected by this Court, was that it would be virtually impossible to enforce strictures against deceptive or misleading claims in advertisements because of the nature of the legal profession. But no such deception is alleged here. Nor is deception likely when legal services are offered without charge to the client. If possible deception in commercial advertising does not pose a sufficient threat to disciplinary enforcement to justify a prohibition of such ads, it follows that the much smaller likelihood of deception in the limited area of offers of free legal services does not sufficiently threaten disciplinary mechanisms to justify a prohibition of such offers. Bates, supra, 97 S.Ct. at 2706-07.

5. "Stirring Up Litigation."

The final interest asserted by the state is the state's interest in preventing attorneys from "stirring up litigation."

But as the Court noted in Bates, "'it is seen that the State's protectiveness of its citizens rests in large part on the advantages of their being kept in ignorance.'" Bates, supra, 97 S.Ct. at 2699, quoting from Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 769 (1976). Thus, insofar as this interest is asserted simply to protect the state or its agents from legitimate claims, it is not a legimate or compelling state interest.

Furthermore, as the Court ruled in NAACP v. Button, supra, 371 U.S. at 439-40:

> Malicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation. And whatever may be or may have been true of suits against governments in other countries, the exercise in our own, as in this case, of First Amendment rights to enforce constitutional rights through litigation, as a matter of law, cannot be deemed malicious.[1]

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1. See, to the same effect, Bates, supra, 97 S.Ct. at 2705:

> Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better to suffer a wrong silently than to redress it by legal action.

Finally, the state court has adopted other, more narrowly applicable rules, to deal specifically with malicious and oppressive litigation.[1] See DR 7-102(A)(1) and (2); DR 7-105(A).

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1. Appellant contended in the lower court that the charges were brought against her not to protect any legitimate state interest, but in retaliation for a law suit brought against the practice of sterilization of Medicaid mothers. The evidence of retaliation included the facts that: (1) appellant's letter to Mrs. Williams was not sent to the board until nearly a year after it was written; and (2) only after attempts to use it as a defense in the sterilization case had been unsuccessful; and (3) the favorable ruling of Judge Blatt that no solicitation had occurred was never forwarded to the board nor brought to its attention. Appellant argued that even misconduct could not be used as a pretext for punishment for reasons other than the misconduct, relying upon United States v. McLeod, 385 F.2d 734, 744 (5th Cir. 1967), and Lenske v. United States, 383 F.2d 20, 27-8 (9th Cir. 1967). Whether or not retaliation was proven or is a defense, that evidence shows that the state did not consider its interest to require the prompt initiation of disciplinary proceedings, and shows that a federal judge did not find the state's interest to be legitimate or compelling.

C. In the Circumstances of This Case, No Other State Interest Would Justify Regulation And Punishment of Appellant's Communications and Activities, All of Which Were Consistent With the Highest Traditions of Legal Service.[1]

Offering free legal assistance to those in need is entirely consistent with the highest traditions of the bar.[2] From the

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1. The state does not argue any interest it may have in regulating the practice of law by a lay entity. See NAACP v. Button, supra, 371 U.S. at 447 (concurring and dissenting opinion of Mr. Justice White). That conceivable interest is not applicable in this case because ACLU's long standing policy expressly recognizes that "[i]n any case where the ACLU or an affiliate has undertaken to furnish direct representation, the judgment of the attorneys who provide such representation must be governed by the client's interest, not the organization's, since they are acting as attorneys for the client, and not for the ACLU." Policy #513, 1976 Policy Guide of the American Civil Liberties Union. That policy reflects the ACLU's commitment to insuring that lawyers associated with the ACLU act only in the highest traditions of legal service and that is what happened in this case.

2. As noted supra, Canon 2 of the ABA Code directs each member of the bar to assist the legal profession in fulfilling its duty to make legal counsel available. The Code recognizes, however, that legal problems "may not be self-revealing and often

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earliest times it has been a self-imposed duty of the profession to represent the poor and disadvantaged, whether in criminal or civil proceedings.[1] In recognition of this fact, the President of the American Bar Association and the Chairperson of the ABA Standing Committee on Legal Aid and Indigent Defendants are ex officio members of the Board of Directors of the National Legal Aid and Defender Association (the ACLU is a member of NLADA). Nearly every lawyer at one

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are not timely noticed." EC2-2. As a result, lawyers are encouraged to "educate laymen to recognize their problems," EC2-1, and may act properly "in volunteering advice to a layman to seek legal services." EC2-3. Unsolicited advice is proper "if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations." Ibid. And having volunteered advice, a lawyer continues to act properly if he or she "facilitate[s] the process of intelligent selection of lawyers, and ... assist[s] in making legal services fully available." EC2-1.

1. H. Cohen, History of the English Bar and Attornatus to 1450, 1929, p. 119; H. Drinker, Legal Ethics, 1953, pp. 62-63.

time or another has given free legal advice and assistance to someone in need. That has been particularly true of those who have distinguished themselves most before the bar and made the greatest contributions to American democracy and jurisprudence.

In 1804, Alexander Hamilton appeared "gratuitously for the defendant [in Croswell v. The People in New York], as affecting very essentially the constitutional right of trial by jury in criminal cases, and the American doctrine of liberty of the press."[1] President Abraham Lincoln, while an Illinois practitioner, often offered his services "to people who had suffered injustice and were unable to pay."[2]

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1. Great American Lawyers, W. Lewis ed., 1907, Vol. I, p. 374.

2. Id., Vol. V, pp. 477-78. Joseph Jefferson, an actor, told a story of how, when his father's theatre company was faced with having to close because of a prohibitive license fee, Lincoln

> called on the managers and offered, if they would place the matter in his hands, to have the license revoked, declaring that he only desired to see fair play, and would accept no fee whether he failed or succeeded. The young lawyer handled the case with tact, skill, and humor, in his argument tracing

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Clarence Darrow offered to represent John Scopes without fee after Scopes was indicted in 1925 for teaching the theory of evolution to public school children in Rhea County, Tennessee.[1] At the same time, William Jennings Bryan made it known through the newspapers that he would like to prosecute Scopes for the state, and his offer was accepted.[2] The common theme of these examples is summarized in NAACP v. Button, supra, 371 U.S. at 443: offering legal assistance "to seek vindication of constitutional rights is a different matter from the oppressive, malicious, or avaricious use of the legal process for purely private

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> the history of the drama from the time when Thespis acted in a cart to the stage of to-day. He illustrated his speech with pointed anecdotes which kept the City Council in a roar of laughter. "This good-humor prevailed," relates the famous actor "and the exhibition tax was taken off."
> Id.

1. L. de Camp, The Great Monkey Trial, 1968, p. 96.

2. Id., p. 72-3. Other major examples include
(Footnote continued to next page.)

gain."[1] Appellant's actions in informing Mrs. Williams of her legal rights, and later, at the request of Mr. Allen, offering to her the free legal assistance of the ACLU, were entirely consistent with the highest traditions of the bar. Appellant performed an essential public service, for no personal gain.

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Reverdy Johnson, formerly an Attorney General of the United States, offering his services in Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), V. Hopkins, Dred Scott's Case, 1971, p. 166, the trial of Mrs. Surratt for complicity in the murder of Lincoln, and, Ex Parte Garland, 71 U.S. (4 Wall.) 366 (1867); and James Louis Petigru, a leading member of the South Carolina bar, representing suspected abolitionists and free blacks seized as slaves. Lewis, supra, Vol. IV, pp. 41, 424, 438-39.

1. Every South Carolina decision finding "solicitation," with the exception of this one, has included the element, totally absent here, of personal gain. In re Craven, 267 S.C. 33, 225 S.E.2d 861, 863 (1976) ("their system of operation was ... designed to ... attract business."); In re Bloom, 265 S.C. 86, 217 S.E.wd 143, 145 (1975)(attorney reprimanded for making cash payments to police officers "to funnel him business."); In re Hartzog, 257 S.C. 84, 184 S.E.2d 116, 117 (1971)(attorney disciplined for "obtaining employment [and] ... charging a grossly excessive fee."); In re Crosby, 256 S.C. 325, 183 S.E.2d 289 (1971)("this plan ... was ... profitable to respondent.") Ex parte Finley, 93 S.C. 37, 81 S.E. 279, 282 (1914)(attorney disciplined for "soliciting business.") App. 21-4.

It is easy to see that poor and disadvantaged citizens would have a compelling and vital interest in permitting such activities, and equally difficult to see how their government would have any legitimate interest in suppression of such activities.[1]

1. The state court ruling not only burdens access to legal services for the poor, near-poor and unknowledgeable, but creates disillusionment with the bar because of failure to serve the public. Bates, supra, 97 S.Ct. at 2702, 2705.

D. No Compelling State Interest is Served by Denying to the ACLU and Attorneys Associated Therewith The Exemptions Available to Similarly Situated Organizations and Attorneys.

As we will show in Point III, infra, the court below found that appellant's activities did not come within the exceptions to the disciplinary rules, and then treated that finding as the equivalent of a violation of the rules to which the exceptions applied, even though there was no direct proof of violation of the rules. That ruling violated appellant's due process right to fair notice. As we will show in this point, however, denying appellant the availability of those exceptions serves no compelling state interest.

The court below construed the disciplinary rules essentially as prohibiting (1) seeking of employment from members of a class, and (2) cooperating with the litigation activities of any organization that either (a) has as a "principal purpose" the providing of legal services, or (b) ever prays for court-awarded attorneys' fees as costs. These restrictions are not

related to any conceivable state interest, nor is there any basis for such an application of the rules either in the ABA Draft of the Code of Professional Responsibility, or the prior decisions of this and other courts.

1. Seeking Employment in Class Actions.

The lower court held that a lawyer may never "seek" employment in litigation in the nature of a class action. J.S.A. 9a. But that is precisely what was done by attorneys associated with the NAACP in school desegregation cases, and such conduct was held in NAACP v. Button, supra, to be a form of association and speech protected by the First Amendment.

If the ACLU may freely offer its legal services to individuals, as the state's positions (but not the decision below) have implied, there is obviously no compelling justification to prohibit the offering of services to individuals who happen to be similarly situated to other individuals. So long as all recoveries go to the class members, App. 183, as required by ACLU policy, concerns about the bringing of class actions to obtain large attorneys' fees from a fund recovered are wholly inapplicable.

2. Providing Legal Services.

The ACLU was held not to be an excepted organization with which appellant could ethically cooperate because it had "the primary purpose of ... rendition of legal services." DR 2-103(D)(5)(a). J.S.A. 10a-11a. But the purposes of the ACLU in providing legal services are not distinguishable from those of the NAACP, which have been held constitutionally protected. NAACP v. Button, supra. There is no compelling state interest that would justify denial to the ACLU of the exempt status granted the NAACP. In Button, supra, 371 U.S. at 419-20, the NAACP's aims and methods were described as follows:

> to secure the elimination of all racial barriers which deprive Negro citizens of the privileges and burdens of equal citizenship rights in the United States. To this end the Association engages in extensive educational and lobbying activities. It also devotes much of its funds and energies to an extensive program of assisting certain kinds of litigation on behalf of its declared purposes.

Similarly, the ACLU has an education program, and lobbyists, App. 6, 177, as well as an

extensive program of litigation on behalf of civil liberties. It is not an organization designed solely to provide litigation services, but it does provide such services in the furtherance of "its declared purpose" to advance and defend the cause of civil liberties. The litigation activities of the ACLU and attorneys associated with it should therefore be entitled to the same constitutional protection afforded in Button.

The facts of this case particularly emphasize the absence of any substantial state interest to justify a ban on offers of assistance from organizations which provide legal services. The initial concern over coerced sterilizations in Aiken was voiced by Gary Allen on behalf of a local community group called United Christian Workers, which assisted local residents with welfare problems. Allen then contacted the South Carolina Council on Human

Rights, another non-profit organization, which sent appellant to the meeting in Allen's office. Had the Council on Human Rights asked Ms. Smith or another attorney, individually, to represent the women, the "legal services" organization issue would not arise. There can be no compelling state interest that supports a rule which turns upon such fine details of the process of initiating public interest litigation on behalf of clients who cannot hire counsel.

Furthermore, there is no compelling state interest that justifies restricting the non-profit legal service operations of the ACLU but not those of the other legal services organizations exempted by DR 2-103(D) -- i.e., (1) legal aid offices, (2) lawyer referral services sponsored by the general bar, or (3) local bar associations.[1] Any concern with steering compen-

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1. The offer of ACLU assistance in this case is analogous to that of the Atlanta Bar Association which in 1940 offered to represent, free of charge, individuals who had been victimized by loan sharks charging usurious interest rates, in suits to recover money. The conduct of the bar was not deemed unethical; it was applauded: "For all of this they should be commended." Gunnels v. Atlanta Bar Association, 191 Ga. 366, 374, 381, 12 S.E.2d 602, 606-07 (1940).

sated business to a limited number of attorneys is wholly inapplicable to the facts of this case, where ACLU cooperating attorneys would not have been compensated. But even if such concerns were present, they would furnish no basis for distinguishing the activities of the ACLU from those of a bar referral service which steers paying clients to attorney participants. It would also be impossible to distinguish ACLU operations from those of the NAACP, in which compensation was paid to staff attorneys to whom desegregation lawsuits were steered. NAACP v. Button, supra, 371 U.S. at 420-21.

3. Attorney's Fees.

The lower court also held that the ACLU was not an exempt organization under DR 2-103(D)(5)(c) because it failed to meet the requirement that it did not "derive a financial benefit from the rendition of legal services by the lawyer." J.S.A. 10a-11a. In lawsuits sponsored by the NAACP, whose conduct was sanctioned in Button, attorneys for years had sought court awards of attorney's fees along with other costs, and the federal courts made

such awards in many suits pending at the time of the Button decision. See, e.g., Bell v. School Board of Powhatan County, Va., 321 F.2d 494 (4th Cir. 1963)(en banc); County School Board v. Allen, 240 F.2d 59 (4th Cir. 1956). Suits brought by the ACLU pursuant to 42 U.S.C. §1983, against state and local governmental programs or officials qualify for an award of attorney's fees as costs under 42 U.S.C. §1988. Other provisions under which civil rights and civil liberties litigation has been sponsored by the ACLU in the past have similar provisions for awards of attorney's fees as part of the costs. See, e.g., 42 U.S.C. §2000e-5(k), §2000a-3(b) and §1973 l(e); 20 U.S.C. §1617. Many other provisions of federal law authorizing awards of attorney's fees characterize them as part of the costs. See, e.g., 15 U.S.C. §15. Surely neither this Court, the American Bar Association, or any other tribunal has ever thought that a state could have any legitimate interest in restricting the recovery of litigation costs awarded to a successful litigant by court order. When the ACLU prays for court-awarded attorney's fees, it is simply asking that,

if the plaintiff prevails, the court award it all litigation costs authorized by law. Cf. Fitzpatrick v. Bitzer, 427 U.S. 445, 460 (1976)(concurring opinion of Mr. Justice Stevens).

The Civil Rights Attorneys' Fees Awards Act of 1976 (42 U.S.C. §1988) is based on an express congressional finding that allowing ACLU and other public interest organizations and attorneys to recover attorney's fees when they prevail in civil rights litigation is an essential mechanism for insuring the enforcement of civil and constitutional rights. See also, Newman v. Piggie Park Enterprises, 390 U.S. 400, 402 (1968). Given that finding, there can be no legitimate and compelling state interest in deterring recovery of such fees by penalizing attorneys associated with public interest organizations.

III. APPELLANT WAS DENIED DUE PROCESS OF LAW IN THAT SHE DID NOT RECEIVE FAIR NOTICE OF THE CONDUCT CHARGED, THERE WAS NO EVIDENCE TO SUPPORT THE RULES FOUND TO BE VIOLATED, AND THE DISCIPLINARY RULES, AS CONSTRUED, ARE VOID FOR VAGUENESS.

Throughout the entire proceedings below appellant was denied the basic requirements of due process. She was not given fair notice of the precise nature of the charges against her. She was found guilty on a record wholly devoid of evidentiary support for the finding. She was found to have violated disciplinary rules only by a construction of the rules by the state court which impermissibly and retroactively enlarged and otherwise altered the scope of the rules.

A. Lack of Notice of the Charges.

Lawyers subjected to bar disciplinary proceedings are entitled to the protections of the due process clause, including "fair notice of the charge." In Re Ruffalo, 390 U.S. 544, 550 (1968). "[The] absence of fair notice as to the reach of the grievance procedure and the precise nature of the

charges deprive[s the accused] of procedural due process." Ruffalo, supra, 390 U.S. at 552. And in deciding whether notice was constitutionally adequate, it is important to remember that bar disciplinary proceedings "are adversary proceedings of a quasi-criminal nature." Ruffalo, supra, 390 U.S. at 551. See also, Cole v. Arkansas, 333 U.S. 197, 201 (1948); In re Gault, 387 U.S. 1, 34 and n. 54 (1967); and DeJonge v. Oregon, 299 U.S. 353, 362 (1947).

Appellant was given notice only that she had allegedly violated the "Canons of Ethics" by "solicitation." J.S.A. 23a-24a. She was never told in what way her conduct was a violation, or of what disciplinary rules.[1] The complaint was thus fatally deficient for failure to give adequate notice of the charges.

Fair notice is not satisfied merely because an accused is notified of the conduct alleged to be unlawful. The Gaults

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1. Appellant could not have been guilty of a violation of the "Canons of Ethics" themselves because they had been repealed by the Supreme Court of South Carolina on March 1, 1973, in favor of the ABA Code. J.S.A. 8a. Moreover, only violations of the Disciplinary Rules of the ABA Code, as opposed to the Canons, are subject to disciplinary actions. ABA Code, Preliminary Statement.

knew prior to trial that their son was detained for allegedly making obscene phone calls. Yet due process was denied because neither they nor their son were given notice of "the specific issues that they must meet." 387 U.S. at 34 and n. 54. Similarly, the defendants in Cole knew that it was their picketing that was claimed to be unlawful. But due process was denied because they were not informed of the elements of the particular provision their conduct allegedly violated. Cole v. Arkansas, supra, 333 U.S. at 199-201. Cf., Wolff v. McDonnell, 418 U.S. 539, 564 (1974)(prison disciplinary proceedings). Notice of "solicitation" in violation of the "Canons of Ethics" does not allege a specific offense, nor does it "accurately and clearly allege all the ingredients of which the offense is composed." United States v. Cook, 84 U.S. (17 Wall.) 168, 174 (1872); see also, Hamling v. United States, 418 U.S. 87, 117 (1974).

The court below, although conceding that the complaint may have been "loosely drafted," was "of the opinion that respondent was fully apprised of the charges against her by the complainant." J.S.A. 8a.

But that is not the case. She was in doubt until after her conviction as to the precise charges against her. In a pre-hearing memorandum appellant argued that since there was no allegation that she accepted employment (which is dealt with in DR 2-104), "the only conceivably applicable rule is Disciplinary Rule 2-103(A)." Respondent's Pre-Hearing Memorandum of Law, p. 1.

Not until the close of the state's case, however, and only after appellant had moved to dismiss the charges for failure to state a violation of any disciplinary rule, did the state -- but not the panel -- list any rules believed to be violated, namely, DR 2-104(A)(5) and DR 2-103(D)(5)(a) and (c). App. 80-2. Even after the hearing, the state invited the panel to search for other rules that might have been violated. Memorandum filed by Complainant, April 8, 1975, p. 3. It was not until the panel rendered its decision that appellant knew the precise charges against her. In reality, appellant was tried first and the charges were specified later. That procedure denied

her due process.[1]

B. There Was No Evidence To Support The Conduct Charged.

Thompson v. City of Louisville, 362 U.S. 199, 206 (1960), established that it is "a violation of due process" to punish an individual without evidence of the alleged wrongdoing. Here, however, substantive elements of the offenses for which appellant was disciplined are not established by the record. DR 2-104(A) requires acceptance of employment; the August letter does not in any way involve

1. When an accused is to defend against rules which contain numerous elements, contingencies, and exceptions, actual notice of the specific charges is essential to preparation of an adequate defense. DR 2-104(A)(5), for example prohibits on its face giving unsolicited advice and accepting employment. The defense could be easily led to believe, as it was here, that the rule could not conceivably be at issue, supra, p. 69. Additionally, because the letter itself recited prior contact with Mrs. Williams, a defense to giving "unsolicited advice" would not appear relevant.

acceptance of employment. Even assuming that subsection (5) created additional violations, rather than exemptions, the state court did not find that appellant ever sought employment for herself or her associates. J.S.A. 6a. And the state court ignored other apparent requirements of subsection (5), neither of which was proven to be present here: (1) that the attorney has a client; and (2) that success in asserting that client's rights is dependent upon the joinder of others. Appellant had no client and no litigation dependent for success upon the joinder of others.

With respect to DR 2-103(D), appellant concluded the hearing with the understanding that the state and the panel had stipulated that the ACLU was exempt under subsection (1)(a), as a legal aid or public defender office operated by a non-profit community organization. App. 185. Only when the panel report was issued did appellant learn that the panel was classifying the ACLU under subsection (5). Even so, neither the panel, the board nor the court below at any time made a finding or recited any record evidence that appellant "assisted"

an organization to "promote" the use of her services or those of her associates.[1] There is no evidence that the ACLU promoted the use of any lawyers' services,[2] much less how the August letter, the only specific unethical act with which appellant was charged, assisted in any promotion.

Since the substantive offenses were not established, appellant was denied due process by the state court order finding her "guilty of unethical conduct." J.S.A. 2a.

C. The Disciplinary Rules, As Construed, Are Impermissibly Vague.

Each of the disciplinary rules defines a violation in its initial sentence; then, the subsections define exempt situations in which conduct otherwise proscribed is never-

1. The state court found only that appellant "did solicit ... on behalf of the ACLU." J.S.A. 6a.

2. The panel itself foreclosed inquiry as to how the ACLU operated but concluded that the organization's activities were entirely proper. App. 179, 184-85.

theless permitted.[1] The court below held that appellant could be disciplined, whether or not her conduct violated the substantive rules, if it should be shown that she failed to come within any of the several exemptions to the rules. In other words, even though her conduct was not expressly prohibited, it could be proscribed because it was not expressly permitted.

Disciplinary Rule 2-104(A) provides:

> A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice.

It is only the acceptance, not the seeking of employment, that triggers the strictures

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1. The subsections are prefaced, in DR 2-103(D) by "However, he may ...," and in DR 2-104(A) by "except that ...." And see, Bates v. State Bar of Arizona, ___ U.S. ___, 97 S.Ct. 2691, 2694, n. 5 (1971).

of DR 2-104(A).[1] See, Smith, "Canon 2: 'A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available,'" 48 Tex.L.R. 285, 295 (1970). Five subsections specify exceptions -- circumstances in which a lawyer may accept employment "resulting from" his advice. The structure of the rule, however, clearly and unambiguously specifies a prohibition against accepting employment resulting from unsolicited advice, not against recommending employment of some third party. Yet the state court held that the exemption created an additional offense. Likewise, with respect to DR 2-103(D), the state court devoted all its discussion to what was required to prove an exemption, not what was required to prove an offense. It is an heroic exercise of grammar and logic to conclude that because

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1. The prohibition on seeking employment is set forth not in DR 2-104(A), but in DR 2-103(A). The state argued that appellant violated DR 2-103(A) by seeking to represent Mrs. Williams, App. 81-2, but neither the panel, the board, nor the state court was persuaded to so find, because the evidence did not establish that appellant had ever recommended employment of any specific attorney or law office.

an exception is not proved, the rule itself has been violated. Such a construction of the rules violates standards of precision for application of quasi-criminal statutes and regulations, particularly in the sensitive area of First Amendment freedoms. [1]

The vice of vagueness resulting from the construction of the rules by the court below was perfectly described by this Court in another South Carolina case:

> When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and that it may be held to cover his contemplated conduct. When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction.
>
> Bouie v. City of Columbia, 378 U.S. 347, 352 (1964).

1. The language of the rules exacerbates the vagueness in their construction. For example:
(Footnote continued to next page.)

This is a classic case in which retroactive judicial construction "may trap the innocent by not providing fair warning,' Grayned v. City of Rockford, 408 U.S. 104, 108 (1972)." Hynes v. Mayor of Oradell, 425 U.S. 610, 622 (1976). See also, Smith v. Goguen, 415 U.S. 566 (1974); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). This is precisely what the South Carolina court did here, and its ruling deprived appellant of due process.

(Footnote continued from preceding page.)
(1) What is a "primary"purpose of an organization as that term is used in DR 2-103(D)(5)(a)? What is the yardstick for distinguishing a "primary" purpose from a subsidiary one?

(2) What is the scope of the "financial benefit" to redound to the organization described in DR 2-103(D)(5)(c)? Does the "benefit" include court awards of litigation costs, so that any organization that seeks reimbursement for any taxable court costs is no longer exempt? Does the "benefit" refer to an entire litigation docket or a single case?

(3) How can anyone define with sufficient precision "the extent that controlling constitutional interpretation ... requires the allowance of such legal service activities"? See DR 2-103(D)(5). Since the interpretation of decisions incorporated by this language must necessarily be disputed and subject to change, the rule is inherently and ineluctably vague.

CONCLUSION

For the foregoing reasons, the order and judgment of the Supreme Court of South Carolina should be reversed.

Respectfully submitted,

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